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Nos. 84-1640, 84-1700, and 84-1704

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

MARSHALL MECHANIK AND JEROME OTTO LILL

JEROME OTTO LILL, PETITIONER

v.

UNITED STATES OF AMERICA

MARSHALL MECHANIK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a facially valid indictment returned by a legally constituted and unbiased grand jury may be dismissed on the basis of a procedural irregularity in the grand jury proceeding.

2. If so, whether the indictment may be dismissed and a conviction reversed on the basis of such irregularity after an otherwise valid conviction has been entered by a petit jury.

3. Whether it is an appropriate remedy to reverse the conviction and dismiss the indictment in the absence of prejudice to the defendant resulting from the procedural irregularity in the grand jury proceeding.

PARTIES TO THE PROCEEDING

In addition to the parties shown in the caption, Shahbaz Shane Zarintash and Steven Henry Riddle were appellants below; as described in our reply brief at the petition stage in No. 84-1640, they have now pleaded guilty to charges that moot the instant case as to them, and therefore they are no longer respondents herein. Mark Douglas Chadwick was also an appellant below, but his appeal was dismissed and he is accordingly not a respondent in this proceeding.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The per curiam opinion of the court of appeals on rehearing en banc (Pet. App. 1a-13a)[1] is reported at 756 F.2d 994. The opinion of the panel of the court of appeals (Pet. App. 14a-25a) is reported at 735 F.2d 136. The opinion of the district court (Pet. App. 26a-53a) is reported at 511 F. Supp. 50.

[1] "Pet. App." refers to the appendix to the government's petition, No. 84-1640.

JURISDICTION

The judgment of the en banc court of appeals was entered on March 1, 1985. The government's petition for a writ of certiorari (No. 84-1640) was filed on April 17, 1985. The defendants' petitions (Nos. 84-1700 and 84-1704) were filed on April 29, 1985. The petitions were granted and the cases consolidated on June 17, 1985.[2] The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

Rule 6(d) of the Federal Rules of Criminal Procedure provides:

> **Who May Be Present.** Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

> **Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

28 U.S.C. 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

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[2] The petition in No. 84-1704 was granted limited to Question 1.

STATEMENT

Following a three-month jury trial in the United States District Court for the Southern District of West Virginia, defendants Mechanik and Lill were convicted of conspiracy, in violation of 18 U.S.C. 371 (Count One). In addition, Mechanik was convicted of traveling in interstate commerce to carry on an illegal business enterprise, in violation of 18 U.S.C. 1952 (Count Ten), and Lill was convicted of importing marijuana and possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 952 and 841, 18 U.S.C. 2 (Counts Two and Four). Mechanik and Lill were each sentenced to five years' imprisonment and fined $10,000.[3] The court of appeals affirmed their convictions on the substantive counts and reversed their convictions on the conspiracy count (Pet. App. 4a).

1. On June 6, 1979, shortly before 1:00 a.m., a DC-6 aircraft carrying approximately ten tons of marijuana crash-landed at an airport near Charleston, West Virginia. Defendant Lill was among those on board the plane. Defendant Mechanik and others were waiting on the ground for the plane. Pet. App. 28a.

On June 12, 1979, a federal grand jury was convened to investigate the marijuana operation. On June 14, 1979, after hearing some 30 witnesses, it returned an indictment containing one conspiracy count and seven substantive counts. The indictment named nine defendants, including Mechanik and Lill. Pet. App. 28a.[4]

Thereafter, the investigation continued and further evidence was obtained (Pet. App. 16a). Accordingly, on July 31 and August 2, 9, and 10, 1979, the same grand jury, consist-

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[3] Two co-defendants, Shahbaz Shane Zarintash and Steven Henry Riddle, were also convicted on the conspiracy count; Zarintash was sentenced to five years' imprisonment and fined $10,000, and Riddle was sentenced to five years' imprisonment and fined $5,000. Two other defendants, James F. Chadwick and Russell Kook, were acquitted. The jury was unable to reach a verdict as to Mark Douglas Chadwick, and a mistrial was declared. Four of the original 12 defendants pleaded guilty to the conspiracy count prior to trial. One defendant is a fugitive.

[4] The original indictment is reprinted at J.A. 9-18.

ing of a nucleus of 17 of the same individual grand jurors,[5] met again to consider the additional evidence. The grand jury then unanimously returned a superseding indictment on August 10, 1979. The superseding indictment was similar in many respects to the first, but it named three new defendants, included two additional substantive counts, and amended and expanded the conspiracy count. Pet. App. 29a, 45a.[6] The substantive counts under which Mechanik and Lill were convicted were identical in both indictments in all respects material to them.[7]

The principal differences between the original and the superseding indictments were in the conspiracy count (Count One), on which Mechanik's and Lill's convictions were reversed by the court of appeals. Each of the alterations in the conspiracy count, other than those deleted by the district court at trial or mooted by the acquittal of other defendants,[8] was supported by evidence from at least two independent sources (Pet. App. 47a). One of those sources was the testimony of Drug Enforcement Administration (DEA) Agents Jerry Rinehart and Randolph James. On August 10, 1979, these agents were placed under oath and testified together before the grand jury. See *id.* at 29a-32a; J.A. 110-148. Agent James testified principally concerning the suspects'

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[5] One of the grand jurors who participated in the original indictment did not participate in the superseding indictment, and two individuals participated in the superseding indictment who had not participated in the original indictment (Pet. App. 46a).

[6] The superseding indictment is reprinted at J.A. 19-33.

[7] Defendant Gregory Louis McCafferty was charged in Counts Two and Four of the original indictment, but not in the corresponding counts of the superseding indictment (Pet. App. 46a & n.10).

[8] At the conclusion of the government's case in chief, the district court redacted the superseding indictment to conform to its rulings on the government's motion to dismiss a portion of the indictment and the defendants' motions to strike and for judgment of acquittal. The redacted superseding indictment is reprinted at J.A. 34-44. In addition, parts of the redacted indictment were stricken by the district court at the close of the evidence (Pet. App. 50a-51a & n.15). Portions of the superseding indictment that had been changed from the original indictment also pertained to defendants Russell Kook and James Chadwick, who were acquitted by the jury.

travel, the rental of Ryder trucks for unloading and transporting the marijuana, and James Chadwick's alleged involvement in the conspiracy; Agent Rinehart testified principally about telephone calls involving the suspects (Pet. App. 32a). The agents generally alternated their testimony, occasionally supplementing each other's answers. Because Rinehart and James handled different aspects of the investigation, this format enabled them to present the evidence in chronological order and to interrelate the various activities of the suspects that were occurring at the same time.

2. Prior to trial, the defendants filed an omnibus motion seeking, inter alia, a list of all people who had appeared before the grand jury. They alleged in general terms that this discovery was essential in order to determine whether any unauthorized person might have been present during the grand jury proceeding. J.A. 45. The government responded that there were no unauthorized persons appearing before the grand jury (J.A. 46). The district court denied the defendants' motion (Pet. App. 26a-27a).

The trial began on February 19, 1980, and concluded on July 3, 1980. During the second week of trial, on February 28, 1980, Agent Rinehart testified as a government witness. At that time, the government furnished the defendants with a portion of the transcript of his grand jury testimony pursuant to the Jencks Act, 18 U.S.C. 3500. The transcript disclosed that on August 10, 1979, Agent Rinehart and Agent James had testified simultaneously before the grand jury. The defendants thereupon moved for dismissal of the indictment on the ground that Fed. R. Crim. P. 6(d) had been violated by the presence of two witnesses before the grand jury at the same time. Pet. App. 27a. On March 14, 1980, the district court denied this motion (J.A. 49-51). Chief Judge Knapp, who was then presiding over the trial, concluded (J.A. 50) that "neither Agent James nor Agent Rinehart, as sworn joint witnesses under examination, was an unauthorized person before the grand jury" and that "[p]resenting the testimony of Agents James and Rinehart as a joint witness was proper under the provisions of Rule 6(d) * * * and was a

reasonable and permissible manner in which to conduct the grand jury proceedings on that occasion."[9]

On May 22, 1980, following the mid-trial reassignment of the case to Judge Copenhaver,[10] the defendants moved for rehearing of the denial of their motion to dismiss the indictment under Fed. R. Crim. P. 6(d) (J.A. 52-54). The district court took the motion under advisement until the conclusion of the trial (Pet. App. 27a-28a).

The jury returned its verdicts on July 3, 1980 (Pet. App. 28a). On August 15, 1980, the district court denied the defendants' motion for dismissal pursuant to Rule 6(d) (Pet. App. 26a-53a).[11] Judge Copenhaver first concluded, contrary to Chief Judge Knapp's earlier ruling, that the joint testimony of Agents Rinehart and James did constitute a violation of the Rule (*id.* at 33a-43a). He noted (*id.* at 38a, 40a) that Rule 6(d) serves to protect the secrecy of grand jury proceedings and to guard against undue influence upon grand jury witnesses or the grand jurors. Although finding that "[r]ealistically * * * the secrecy of the grand jury proceedings was not threatened by virtue of the joint appearance in this case" (Pet. App. 40a), the court believed that "the joint witness approach tended to be detrimental to the grand jurors' ability to assess the credibility and personal knowledge of Agents Rinehart and James and to contrast and compare the substantive evidence elicited through their testimony" (*id.* at 41a).

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[9] While the trial continued, the defendants filed a notice of appeal from the district court's denial of their motion to dismiss and sought a stay pending appeal. The stay was denied. On April 10, 1980, the court of appeals denied their petition for a writ of mandamus and for a writ of prohibition. See Pet. App. 27a.

[10] Chief Judge Knapp had been unexpectedly hospitalized during the trial (Pet. App. 27a-28a).

[11] On August 1, 1980, the district court, while reserving decision on the Rule 6(d) issue, had denied the defendants' motion to dismiss the indictment on grounds of government misconduct (C.A. App. A1700-A1723). Insofar as relevant here, the court determined that "the grand jury proceedings subsequent to June 14, 1979 [the date of the original indictment], were reasonably related to the grand jury's continuing investigation of other potential defendants" (*id.* at A1702) and that there was "no intention

Although it concluded that Rule 6(d) had been violated, the district court declined to set aside the defendants' indictment and convictions (Pet. App. 43a-53a). The court assumed that if this issue were being resolved "prior to trial, dismissal might well be decreed as the proper and prudent course" (*id.* at 51a).[12] However, noting that the Rule "does not prescribe the sanction to be imposed for its violation" (*id.* at 52a), the court declined to order dismissal in this case. Based on a meticulous examination of the original and superseding indictments returned by the grand jury and the evidence on which the indictments rested, the court found that the Rule 6(d) violation had not prejudiced the defendants. First, with respect to the substantive counts in the superseding indictment, "there was neither prejudice nor potential for prejudice" because those charges were unchanged from the valid initial indictment in any way material to the convicted defendants (*id.* at 46a). Second, with respect to the conspiracy count, the grand jury "had before it ample independent evidence [apart from the joint testimony] to support a probable cause finding of the charges" (*id.* at 51a). Accordingly, the court concluded that "the grand jury would * * * undoubtedly have returned the very same second indictment even had Agents Rinehart and James testified separately" (*ibid.*). For this reason, prejudice to the defendants was possible only "in the sense that all things are possible[.] * * * [T]he existence of actual prejudice as to the conspiracy count is so utterly remote and the absence of actual prejudice as to the * * * substantive counts is so plain that a mere possibility of prejudice can appropriately be disregarded" (*ibid.*).

In light of these determinations, the district court explained that post-trial dismissal of the indictment would "confer[] a windfall benefit on [the] defendants who stand convicted after a three-month trial conducted at enormous ex-

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by the government to confuse or misinform the grand jury through the use of the joint testimony, nor evidence of bad faith" (*id.* at A1705). See also Pet. App. 12a.

[12] The court explained that "[p]retrial dismissal would serve the salutary disciplinary function of underscoring the care which the prosecutor must observe in meeting the requirements of Rule 6(d)" (Pet. App. 51a).

pense to the United States and the defendants" (Pet. App. 51a). Rather than imposing such a drastic and unwarranted remedy, the court undertook to ensure compliance with the one-witness rule in the future by directing the government "henceforth * * * routinely to advise the court with respect to each criminal case indictment whether the requirements of Rule 6(d) have been fulfilled" (Pet. App. 52a). The court observed (*id.* at 52a-53a) that it would be able "to monitor the accuracy of the reporting process" by virtue of disclosures pursuant to the Jencks Act, 18 U.S.C. 3500, and "the increasing frequency with which the court is called upon to review grand jury material for various *in camera* purposes."

3. a. A divided panel of the court of appeals reversed the conspiracy convictions (Pet. App. 14a-22a). After concluding that the joint testimony was a violation of Rule 6(d), the court "reject[ed] the argument that defendants must show that a rule 6(d) violation prejudiced them before an indictment may be dismissed" (Pet. App. 18a-19a; see also *id.* at 20a). It reasoned that Rule 6(d) is "plain and unequivocal in limiting who may appear before a grand jury" and that a requirement that the defendant show prejudice "would impose a difficult burden that could undermine the protection that the rule provides" (Pet. App. 19a). As a basis for distinguishing its decision in *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983), in which the court seemingly rejected the application of a per se rule to violations of Rule 6(d), the court of appeals concluded that the agents' joint testimony here "could have" bolstered each agent's credibility and "could have" influenced the grand jurors' decision to return the superseding indictment (Pet. App. 20a).[13]

At the same time, the court of appeals affirmed the convictions of Mechanik and Lill on the substantive counts of the indictment. Because these three substantive counts in the superseding indictment were identical to counts returned in the untainted original indictment by the same grand jury, the court found "a valid basis for the charges they set forth that

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[13] We note that the grand jury proceedings in this case antedated the court of appeals' decision in *Computer Sciences*.

was independent of the unauthorized joint appearance of the agents" (Pet. App. 21a). In this circumstance, "invocation of a per se rule of invalidity is inappropriate" (*ibid.*).

Judge Hall dissented from the reversal of the conspiracy convictions (Pet. App. 23a-25a). Noting that "even on appeal [the defendants] have been unable to advance any basis for a claim of prejudice" (*id.* at 24a), Judge Hall relied on the "carefully reasoned opinion" (*id.* at 23a) and "detailed analysis" (*id.* at 24a) of the district court to conclude that the Rule 6(d) violation had not resulted in any prejudice. Moreover, he found the majority's decision "particularly undesirable here, where the part of the superseding indictment found to be bad closely tracked the charging portion of the original indictment and in no way surprised or prejudiced the defendants" (*id.* at 25a). Finally, the dissent observed (*ibid.*) that the majority had established a "*per se* rule" of dismissal that was inconsistent with the analysis in *Computer Sciences*.

b. The full court ordered rehearing en banc (Pet. App. 54a-55a). On rehearing, by a vote of seven to five, the court reversed the conspiracy convictions for the reasons stated in the panel opinion (*id.* at 2a). In addition, by a vote of ten to two, the court affirmed the substantive convictions of Mechanik and Lill for the reasons stated by the panel (*ibid.*).

Judge Wilkinson, joined by Judges Russell, Hall, Chapman, and Sneeden, dissented from the en banc judgment "insofar as it invokes 'a per se rule of invalidity' to reverse the convictions and dismiss the conspiracy count in the superseding indictment" (Pet. App. 5a). The dissent concluded that such a per se standard was not required by Rule 6(d) and was inconsistent with the harmless-error standard in Fed. R. Crim. P. 52(a) and 28 U.S.C. 2111 (Pet. App. 7a-8a). Moreover, the dissent found it "inexplicable" that Rule 6(d) should give rise to a remedial standard of per se dismissal that "the Supreme Court has refused to accord non-prejudicial departures from most constitutional norms" (Pet. App. 9a). In this case, a "comparison of testimony and the history of this particular grand jury fully support the determination [by the district court] that the defendants suffered no prejudice through the joint appearance of the agents" (*id.* at 13a) and "that the

government conduct revealed no evidence of bad faith and no intent to confuse or mislead the grand jury" (*id.* at 12a). Accordingly, the dissent stated that the relevant "factors were properly weighed" by the district court and that "the relief [it] granted * * * was appropriate to the situation" (*id.* at 13a). In contrast, the majority's holding of per se dismissal meant that

> [w]ithout cause or compensation, the public will now pay the price, and convicted criminal defendants will now reap the windfall benefit, of a prosecutorial mistake. This result is not right in a system of criminal justice which has become enormously complex and in which even seasoned judges and attorneys are not immune from error.

Id. at 5a.

Judges Widener and Phillips dissented from the affirmance of the convictions of Mechanik and Lill on the substantive counts (Pet. App. 2a). In their view, "these counts of the indictment [should be dismissed] for the same reasons that [the conspiracy count] is dismissed" (*ibid.*).

SUMMARY OF ARGUMENT

I

It is a well-settled principle of federal criminal procedure that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (footnote omitted). In this case, it is undisputed that the grand jury that indicted the defendants was legally constituted and unbiased, and neither its authority nor its impartiality was impaired by the joint testimony of the DEA agents. Accordingly, under *Costello*, this violation of Rule 6(d) provides no basis for dismissal of the indictment.

The *Costello* rule recognizes that the grand jury is designed to serve only a limited function in the criminal justice system. In contrast to the petit jury, the grand jury neither adjudicates the issue of guilt or innocence nor is bound by the vari-

ous procedural and evidentiary protections afforded a criminal defendant at trial. Rather, it is a nonadversarial and unstructured proceeding to determine whether, under a standard of probable cause, there is a sufficient basis to call for a trial before a petit jury. Thus, the grand jury is merely a preliminary step in the overall process and constitutes a "rough" screen to eliminate at the outset those accusations that are not supported by probable cause.

In view of the narrow role played by the grand jury, facially valid indictments should not be open to pretrial challenge and dismissal on grounds of procedural irregularity. A contrary rule encourages defendants routinely to contest the propriety and adequacy of the grand jury proceeding, especially in cases involving lengthy or complex investigations. Litigation over such claims—the vast majority of which, experience indicates, are likely to be unfounded—would both delay the trial on the merits and impose substantial demands on finite judicial and prosecutorial resources. In addition, a procedural irregularity generally would not undermine the existence of probable cause, and requiring the government to re-present its case to a second grand jury—merely in order to obtain a procedurally proper indictment—pointlessly imposes significant costs on the prosecutor, the victims of crime and other witnesses, and the citizens empaneled on grand juries.

Nor can these burdens on the criminal justice system be justified in terms of minimizing to any appreciable extent the danger that defendants will be forced to trial on unwarranted allegations. It does not denigrate the importance of the screening function of the grand jury to recognize that the occurrence of a procedural error is unlikely to mean that the defendant was indicted without probable cause or to suggest that he would not simply be reindicted by a new grand jury. And even if pretrial dismissal might on occasion marginally further the grand jury's proper performance of its screening role, any benefit of this type would not be sufficient to offset the substantial systemic costs that would result from encouraging defendants to litigate challenges to the procedural regularity of the grand jury that indicted them.

Finally, the remedy of dismissal is not necessary in order to enforce grand jury procedural rules. Instead, alternative remedies are available—such as contempt, disciplinary sanctions, public reproach, or regular notification to the court that the rules have been observed—that, by focusing on the responsible prosecutor, both better serve to ensure future compliance and avoid the substantial costs that dismissal imposes on the criminal justice system. And while application of the *Costello* principle will substantially reduce the incentives to indicted defendants to discover and challenge grand jury irregularities, such procedural violations as may on occasion occur will be revealed to the courts in ways other than motions to dismiss, including the required disclosure of grand jury materials under the Jencks Act, 18 U.S.C. 3500.

II

Even if a procedural irregularity in the grand jury can be a basis for pretrial dismissal of the indictment, it cannot warrant reversal of a conviction once the defendant has been found guilty beyond a reasonable doubt by a petit jury at a fair trial. Such post-conviction relief would entail significant societal costs well beyond those that would result from a pretrial remedy. These include (1) the substantial burden on all concerned—the courts, the prosecutor, members of the public who are called to participate as jurors or witnesses, and, of special importance, the victims of crime—of repeating a fair and error-free trial on the issue of the defendant's guilt or innocence; (2) the practical reality, in view of the passage of time, that a retrial might not be possible at all or that the government might not be able to satisfy at the second trial the stringent standards necessary to secure a conviction, thus absolving a guilty defendant from any penalty for his crime; and (3) the attendant delay that frustrates the prompt administration of justice and impedes the objectives of deterrence and rehabilitation.

Even more importantly, a defendant convicted by a petit jury at trial no longer has any cognizable interest in litigating the question of the procedural regularity of the grand jury process. The petit jury's verdict of guilt beyond a reasonable

doubt necessarily establishes the existence of probable cause to prosecute, dispels any concern that the defendant was required to stand trial on an unfounded charge, and in effect conclusively renders any grand jury impropriety harmless error. The issue of probable cause is thus merged into the conviction, and the procedural validity of the grand jury's screening mechanism is of no continuing legal consequence. Accordingly, at least outside the unique context of racial discrimination in the selection of the grand jury (see *Rose* v. *Mitchell*, 443 U.S. 545 (1979)), a defect in the grand jury proceeding should not be a ground for post-trial reversal of an otherwise valid conviction determined by a petit jury.

III

Even if a procedural grand jury error provides a basis for relief in some circumstances, dismissal of an indictment or reversal of a conviction remains wholly inappropriate in the absence of some likelihood of prejudice to the defendant. Under the governing principle that judicial remedies should be tailored to correct the adverse effect of a violation on the defendant and not unnecessarily infringe on competing societal interests, dismissal or reversal would be unwarranted unless there has been demonstrable prejudice. Likewise, under Fed. R. Crim. P. 52(a) and 28 U.S.C. 2111, federal courts are required to disregard errors that are harmless and do not affect the defendant's substantial rights. In light of these standards, it is clear that the court of appeals' approach of per se reversal for a Rule 6(d) violation, without regard to whether the violation was likely to have impacted materially on the decision to indict, is fundamentally misconceived. In dealing with grand jury errors outside the Rule 6(d) area, the courts of appeals have held that the remedy of dismissal or reversal is unavailable absent prejudice; Rule 6(d) violations seem generally less likely than other errors to result in actual prejudice and therefore surely do not deserve the special status of per se reversal accorded by the court below.

Under the proper standard, it is manifest, as the district court found, that no prejudice occurred. The joint testimony of the DEA agents in this case did not threaten the under-

lying policies of Rule 6(d) to preserve grand jury secrecy and to avoid intimidation from the presence of unauthorized persons. Moreover, the joint testimony concerned a superseding indictment that made minor changes in the conspiracy charges preferred against these defendants; in fact, the original and unchallenged indictment would have been sufficient to allow the government at trial to prove the unalleged overt acts that were added in the superseding indictment that the defendants contest. Finally, every material statement in the joint testimony was supported by independent and untainted evidence before the grand jury. Thus, as the district court found, "the grand jury would * * * undoubtedly have returned the very same second indictment even had [the DEA agents] testified separately" (Pet. App. 51a). In these circumstances, the violation of Rule 6(d) was assuredly nonprejudicial and provides no basis for setting aside the indictment and convictions.

ARGUMENT

It is important to make clear at the outset what is not involved in this case. There is no dispute that defendants Mechanik and Lill were convicted by the petit jury at a fair trial based on proof beyond a reasonable doubt.[14] Nor is it claimed that the joint grand jury testimony of DEA Agents Rinehart and James affected the fairness of that trial in any way. Compare *United States* v. *Morrison*, 449 U.S. 361, 365-366 n.2 (1981). In addition, the courts below did not suggest, and Mechanik and Lill do not contend, that the agents' joint testimony violated the Grand Jury Clause of the Fifth Amendment. See also *Walker* v. *Estelle*, 525 F.2d 648, 649 (5th Cir. 1976). This case therefore presents no constitutional question of a defendant's right to indictment by a grand jury. Finally, we have not sought review of the holding below that

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[14] Indeed, as the district court commented (C.A. App. A1713):

> [P]erhaps the energy with which the * * * convicted defendants have catalogued and argued governmental misconduct betrays an essential weakness in their cases. Were it not for governmental errors or misconduct, which the court has found to be in the end harmless, the defense offered by the convicted defendants would have been minimal.

the joint testimony violated Fed. R. Crim. P. 6(d). Thus, no issue is before the Court of the Rule's substantive standard. Compare *Hobby* v. *United States*, No. 82-2140 (July 2, 1984) slip op. 3.

Accordingly, the sole question here is the remedial one of the consequences that attach to a breach of Rule 6(d). The Rule itself is silent on this issue. Nevertheless, the court of appeals concluded that violation of Rule 6(d) requires that an indictment be set aside, and an otherwise valid conviction by a petit jury be reversed, wholly without regard to whether the defendant was prejudiced by the violation. This judicially-created remedy is inconsistent with the limited role of the grand jury in the federal system and the narrow purposes of Rule 6(d). Moreover, the court of appeals' decision would substantially burden the criminal justice process without providing commensurate benefits to innocent criminal defendants that might justify its costs. In our view, there is no place in federal criminal procedure for a rule of per se dismissal that results in such unjustified systemic costs and confers windfall benefits on defendants who have properly been convicted upon proof beyond a reasonable doubt at a fair and untainted trial.

We submit (1) that a procedural irregularity before the grand jury, such as a violation of Rule 6(d), is never a sufficient basis for dismissing a facially valid indictment returned by a legally constituted and unbiased grand jury; (2) that, even if such an irregularity would entitle a defendant to obtain dismissal of an indictment before trial, it would not warrant reversal of an otherwise valid conviction; and (3) that, in any event, dismissal of an indictment either before or after trial is an inappropriate sanction in the absence of prejudice to the substantial rights of the defendant.

I. A PROCEDURAL IRREGULARITY IN THE GRAND JURY DOES NOT JUSTIFY THE DISMISSAL BEFORE TRIAL OF A FACIALLY VALID INDICTMENT RETURNED BY A LEGALLY CONSTITUTED AND UNBIASED GRAND JURY

A. Allowing An Indictment To Be Dismissed For Procedural Error Is Not Warranted In View Of The Limited Function Served By The Grand Jury And The Costs That Recognizing A Dismissal Remedy Would Impose On The Criminal Justice System

As the Court has explained, the grand jury has two purposes in the federal system of criminal procedure.[15] First, in accordance with its historical origin, [16] the grand jury performs an investigative function "as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). In this capacity, the grand jury is " 'an important instrument of effective law enforcement' " (*id.* at 344, quoting *Branzburg* v. *Hayes*, 408 U.S. 665, 701 (1972)) and " 'implements a fundamental governmental role of securing the safety of the person and property of the citizen' " (*Calandra*, 414 U.S. at 344, quoting *Branzburg*, 408 U.S. at 700). Second, the grand jury has also evolved as "a protector of citizens against arbitrary and oppressive governmental action * * * [in bringing] unfounded criminal prosecutions." *Calandra*, 414 U.S. at 343. It thus acts as "a shield against arbitrary accusations" (*United States* v. *Mandujano*, 425 U.S. 564, 573 (1976) (plurality opinion)) by " 'determin[ing] whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.' " *Branzburg*, 408 U.S. at 687 n.23, quoting *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962).[17] Taken together, the respon-

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[15] The Constitution does not require that state criminal prosecutions be initiated by grand jury indictment. See *Branzburg* v. *Hayes*, 408 U.S. 665, 688 n.25 (1972); *Hurtado* v. *California*, 110 U.S. 516 (1884).

[16] See, *e.g.*, *Ex parte Bain*, 121 U.S. 1, 10-11 (1887); *Hurtado* v. *California*, 110 U.S. at 529-530; T. Plucknett, *A Concise History of the Common Law* 112-113, 126-127 (5th ed. 1956); Note, *The Grand Jury as an Investigatory Body*, 74 Harv. L. Rev. 590, 590 (1961).

[17] The Court has had occasion to note that the grand jury may no longer in fact "serve its historical role as a protective bulwark standing solidly

sibilities of the grand jury are "to inquire into the existence of possible criminal conduct and to return only well-founded indictments." *Branzburg,* 408 U.S. at 688.

In this case, the defendants do not challenge the authority, the composition, or the impartiality of the grand jury that indicted them. Nor do they challenge the facial sufficiency of the charges contained in the indictment. Accordingly, the issue of dismissal is governed by the rule, long recognized by this Court, that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *Costello* v. *United States,* 350 U.S. 359, 363 (1956) (footnote omitted). See also *Calandra,* 414 U.S. at 344-345; *Lawn* v. *United States,* 355 U.S. 339, 349 (1958); *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594, 599 (1950); *Ex parte United States,* 287 U.S. 241, 250 (1932); *Holt* v. *United States,* 218 U.S. 245 (1910); *Beavers* v. *Henkel,* 194 U.S. 73, 84-85, 88 (1904); *Bracy* v. *United States,* 435 U.S. 1301, 1303 (1978) (Rehnquist, Circuit Justice).[18]

The *Costello* rule is a cardinal principle of federal criminal procedure and reflects two fundamental considerations. The first is that the grand jury plays only a discrete and limited role in the overall criminal justice system. By its very nature, the grand jury is simply a preliminary step in the prosecution process. "A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *Calandra,* 414 U.S. at 343. Instead, the grand jury is merely a screening mechanism to determine whether there is a sufficient basis to require the suspect to stand trial before a petit jury.[19]

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between the ordinary citizen and an overzealous prosecutor." *United States* v. *Dionisio,* 410 U.S. 1, 17 (1973); see also *United States* v. *Mara,* 410 U.S. 19, 45-46 (1973) (Marshall, J., dissenting).

[18] To similar effect, the Court has said that a presumption of regularity attaches to grand jury proceedings. *Hamling* v. *United States,* 418 U.S. 87, 139 n.23 (1974).

[19] See *Calandra,* 414 U.S. at 343-344, 349; *United States* v. *Washington,* 431 U.S. 181, 191 (1977); *Hannah* v. *Larche,* 363 U.S. 420, 449 (1960); *Ewing* v. *Mytinger & Casselberry,* 339 U.S. at 599; *Bracy,* 435 U.S. at 1302.

In contrast to the panoply of stringent procedural and evidentiary safeguards applicable at a criminal trial, the grand jury is a much less formal and structured proceeding that is not patterned on the traditional adversarial process. See *Calandra*, 414 U.S. at 349. For example, the grand jury conducts its investigation ex parte and receives evidence only from the prosecutor; neither the suspect nor his attorney is entitled to appear before the grand jury to testify or present argument, to adduce affirmative evidence, or to cross-examine witnesses or otherwise rebut the prosecutor's presentation.[20] The rules of evidence do not apply, and the grand jury is free to consider hearsay or other incompetent evidence as well as evidence that was illegally obtained;[21] the competency and adequacy of the evidence before the grand jury is not open to judicial review,[22] and indeed grand jurors are not confined to the evidentiary record but "may act on

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[20] See, *e.g.*, *Calandra*, 414 U.S. at 343-344; *Hannah* v. *Larche*, 363 U.S. at 449; *United States* v. *Pabian*, 704 F.2d 1533, 1538-1539 (11th Cir. 1983). Likewise, the prosecutor is not required to impeach his own witnesses or present exculpatory evidence on behalf of the suspect. See, *e.g.*, *United States* v. *Jones*, 766 F.2d 994, 998 n.1 (6th Cir. 1985), petition for cert. pending, No. 85-398; *United States* v. *Adamo*, 742 F.2d 927, 936-938 (6th Cir. 1984), cert. denied, No. 84-5637 (Jan. 21, 1985); *United States* v. *Sutton*, 732 F.2d 1483, 1488-1489 (10th Cir. 1984), cert. denied, No. 84-197 (Jan. 14, 1985); *United States* v. *Hyder*, 732 F.2d 841, 844 (11th Cir. 1984); *United States* v. *Levine*, 700 F.2d 1176, 1180-1181 (8th Cir. 1983); *United States* v. *Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, 461 U.S. 932 (1983); *United States* v. *Sweeney*, 688 F.2d 1131, 1138-1139 (7th Cir. 1982); *United States* v. *Cederquist*, 641 F.2d 1347, 1353 n.3 (9th Cir. 1981); but see *United States* v. *Samango*, 607 F.2d 877 (9th Cir. 1979).

[21] See, *e.g.*, Fed. R. Evid. 1101(d)(2); *United States* v. *Calandra*, *supra*; *United States* v. *Blue*, 384 U.S. 251, 255 & n.3 (1966); *Lawn* v. *United States*, *supra*; *Costello* v. *United States*, *supra*; *Holt* v. *United States*, *supra*; *United States* v. *Murphy*, 768 F.2d 1518, 1533 (7th Cir. 1985); *United States* v. *Rogers*, 751 F.2d 1074 (9th Cir. 1985); *United States* v. *Bein*, 728 F.2d 107, 113 (2d Cir. 1984); *United States* v. *Nembhard*, 676 F.2d 193, 199 (6th Cir. 1982), cert. denied, 464 U.S. 823 (1983); but see *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972).

[22] See, *e.g.*, *Calandra*, 414 U.S. at 345; *Costello*, 350 U.S. at 363; *Murphy*, 768 F.2d at 1533-1534; *Adamo*, 742 F.2d at 939.

tips, rumors, * * * or their own personal knowledge." *United States* v. *Dionisio*, 410 U.S. 1, 15 (1973).[23] The standard governing the grand jury's deliberations is probable cause, not proof beyond a reasonable doubt, and, unlike the requirement of juror unanimity at a federal criminal trial, an indictment may be returned if as few as 12 of 23 grand jurors concur. See Fed. R. Crim. P. 6(a), (b)(2), and (f). And in the event that a grand jury declines to charge a suspect, the prosecutor may re-present the case and obtain an indictment from a subsequent grand jury.[24].

Thus, the grand jury provides a flexible means to screen out at the beginning of the criminal process those cases in which charges against a suspect would be unfounded. Its essential characteristic is a kind of "rough justice" approach to determine whether further proceedings would be unwarranted, and this orientation sharply distinguishes it from the trial before the petit jury on the merits of guilt or innocence.

The second factor underlying the *Costello* rule is the recognition that, in light of the nature and function of the grand jury, it would impose significant and unjustified costs on the criminal justice system to subject indictments to searching pre-trial scrutiny and allow them to be dismissed for procedural irregularity. See *United States* v. *Murphy*, 768 F.2d 1518, 1533-1534 (7th Cir. 1985); M. Frankel & G. Naftalis, *The Grand Jury* 72, 83 (1977). Litigation over these issues would entail a substantial expenditure of prosecutorial and judicial resources and would impede the prompt adjudication of the central question in the case—the defendant's guilt or innocence. As the Court reasoned in *Costello*, 350 U.S. at 363:

> If indictments were to be held open to challenge on the ground * * * [of procedural irregularity], the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine * * * [the existence and effect of an irregularity].

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[23] See also, *e.g.*, *Costello*, 350 U.S. at 362.

[24] See, *e.g.*, *Ex parte United States*, 287 U.S. 241, 250-251 (1932); *United States* v. *Thompson*, 251 U.S. 407, 413-415 (1920); *United States* v. *Claiborne*, 765 F.2d 784, 794 (9th Cir. 1985); *United States* v. *Pabian*, 704 F.2d 1533, 1537 (11th Cir. 1983).

Moreover, such challenges, if sufficient to invalidate an indictment, would predictably be raised with great frequency in criminal cases, especially those in which the grand jury's investigation was lengthy and complex. The possibility of some imperfection in a grand jury proceeding is all too easy to imagine and allege, and defendants ordinarily have every incentive to seek to defeat or at least delay the prosecution as well as to obtain discovery not otherwise available concerning the government's case. Motions to dismiss indictments for possible grand jury irregularity, and to produce grand jury transcripts to determine the propriety of the charging proceeding, are already common fare in the federal system, and indeed trial practice guides for defense counsel specifically refer to the numerous tactical advantages of such pre-trial motions.[25] These concerns are aptly illustrated by the instant case, in which the defendants simply filed a boilerplate motion to discover grand jury minutes in a "fishing expedition" to uncover possible grounds for dismissing the indictment (see J.A. 45).

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[25] See, *e.g.*, 1 A. Amsterdam, *Trial Manual for the Defense of Criminal Cases* § 172 (1984); 1 M. Eisenstein, S. Allen, & D. Winston, *Criminal Defense Techniques* § 6A.02[5] (1985); B. Gershman, *Prosecutorial Misconduct* §§ 2.1-2.9 (1985); National Lawyers Guild, *Representation of Witnesses Before Federal Grand Juries* § 13.4(b)(1) (3d ed. 1985). In fact, one authority, although acknowledging that this course might not succeed in preventing prosecution "in light of the probabilities of reindictment," nevertheless goes on to note the tactical advantages of filing such motions:

> [K]nocking out an indictment is often a victory that demoralizes the prosecution considerably and commensurately improves the bargaining posture of the defense. * * * Fringe benefits of the motions to quash or dismiss should also not be ignored: (a) If denied, they leave a claim of error that may be pressed on appeal from conviction; (b) if granted, they ordinarily delay the trial at least one criminal term (which may, of course, be a blessing or a bane, depending on the circumstances of the defense); and (c) whether granted or denied, they may occasion some inquiry into the proceedings before the grand jury (perhaps even serving as the basis for a defense request to examine all or portions of the grand jury transcript), knowledge of which may enable counsel to gain some measure of informal discovery of the prosecution's case.

A. Amsterdam, *supra*, at 1-193 to 1-194.

In addition to such litigation costs, pretrial dismissal of indictments would impose a further systemic burden because of the need to conduct a new grand jury proceeding to seek the reindictment of the defendant. Procedural irregularity before the first grand jury does not entitle the defendant to immunity from prosecution, and any dismissal of the indictment should be without prejudice to reinstituting the charges.[26] Especially since a dismissal like the one sought in this case would not prevent a new grand jury from considering the same evidence as was before the previous grand jury, it seems most unlikely, as Mechanik and Lill concede (Br. 14), that a subsequent grand jury would not find an adequate basis to reindict the defendant in virtually every case. The costs of this repetitive process for those involved—the victims of the crime, other witnesses before the grand jury, citizens required to serve as grand jurors, and the government prosecutor and investigators—cannot be ignored. Nor, contrary to the assumption of some courts that have considered the Rule 6(d) issue,[27] are these costs minor or inconsequential. Federal grand juries are authorized to sit for 18 months or more, and their investigations—which can span the life of more than one grand jury—often probe extremely complex and extensive criminal enterprises and involve the testimony of large numbers of witnesses and the introduction of voluminous documentary and physical evidence;[28] to duplicate such a presentation in a second grand jury pro-

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[26] See, *e.g.*, *United States* v. *Reed*, 726 F.2d 570, 578 (9th Cir. 1984), cert. denied, No. 83-1912 (Oct. 1, 1984); *United States* v. *Fulmer*, 722 F.2d 1192, 1195-1196 (5th Cir. 1983); see also *United States* v. *Blue*, 384 U.S. 251, 255 & n.3 (1966); A. Amsterdam, *supra*, at 1-193.

[27] See, *e.g.*, *Latham* v. *United States*, 226 F. 420, 422 (5th Cir. 1915); *United States* v. *Treaduway*, 445 F. Supp. 959, 964 (N.D. Tex. 1978).

[28] See Fed. R. Crim. P. 6(g); see also, *e.g.*, *United States* v. *Kilpatrick*, 594 F. Supp. 1324 (D. Colo. 1984), appeal pending, No. 84-2481 (10th Cir.) (dismissal of 27-count indictment returned after 21-month grand jury investigation); *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181, 1184 & n.3 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983) (reversal of dismissal on Rule 6(d) grounds of 57-count indictment returned after 18-month grand jury investigation).

ceeding could be exceedingly difficult and burdensome.[29] And even in less complicated prosecutions, these costs would frequently be substantial; in this case, for instance, nearly 30 witnesses testified before the grand jury in connection with the original indictment (see page 3, *supra*).

Conversely, dismissal of indictments for procedural irregularity, while requiring the criminal justice system to bear significant costs, would add little if anything to the basic soundness and fairness of the process. Judicial review of the workings of the grand jury does nothing to safeguard the defendant's rights at trial or contribute to the integrity and accuracy of the petit jury's eventual determination. Furthermore, even with respect to the grand jury's pretrial screening function, it is most improbable that a procedural error of the sort at issue here would undermine the reliability of the determination of probable cause or render the trial on the indictment "oppressive" and "unfounded" (*Calandra*, 414 U.S. at 343). And, as noted above, the end result of such a dismissal is likely to be that the defendant will simply be reindicted by a subsequent grand jury. Perhaps it is conceivable that there would once in a great while actually be a case in which there has been a serious irregularity that, when eliminated on re-presentment of the case, would result in a refusal by the grand jury to indict; but the abstract possibility of such rare and isolated occurrences is too slight to justify the costs associated with allowing all defendants to challenge their indictments.

Just as there is no perfect trial,[30] so too there is no perfect grand jury proceeding. Given the limited role of the grand jury as a preliminary step in the criminal process, its proceedings should not be allowed to become "fertile ground to

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[29] For example, if only one grand jury were sitting in a district and that jury were found to have been tainted by the presentation of evidence in violation of Rule 6(d), it would be necessary to convene a separate grand jury solely for the purpose of seeking a new indictment in one case.

[30] See, *e.g.*, *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 552-553 (1984); *United States* v. *Hasting*, 461 U.S. 499, 508-509 (1983).

be combed for evidentiary or other error." *United States* v. *Bari*, 750 F.2d 1169, 1176 (2d Cir. 1984), cert. denied, No. 84-6261 (June 17, 1985). To permit an indictment to be contested on the basis of procedural irregularity, even though it is facially valid and was returned by a legally constituted and unbiased grand jury, would given undue emphasis to the grand jury's role and require the system to devote excessive resources to monitoring the grand jury's performance—resources that would be disproportionate to the negligible or nonexistent benefits obtained and that could be better utilized in other phases of the criminal justice process.

As the Court has noted in other contexts, the "trial on the merits [should be] the 'main event' " (*Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977)), and "the prominence of the trial itself" (*Engle* v. *Isaac*, 456 U.S. 107, 127 (1982)) should not be overshadowed by a focus on other stages of the proceeding. See also *Anderson* v. *Bessemer City*, No. 83-1623 (Mar. 19, 1985), slip op. 9-10. In our view, the systemic costs of dismissing indictments for procedural irregularity are sufficiently evident and substantial, and the absence of corresponding benefits sufficiently clear, that dismissals on such grounds should not be permitted. Cf. *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 10; *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 21; *Oliver* v. *United States*, No. 82-15 (Apr. 17, 1984), slip op. 9-10. The Court's conclusion in *Costello* is thus controlling (350 U.S. at 364):

> In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial.

In fact, the courts of appeals have generally rejected claims that an indictment should be dismissed prior to trial on the ground of a procedural error in the grand jury proceeding. These courts have recognized that "[b]ecause it is a drastic step, dismissing an indictment"—even before trial—"is a disfavored remedy" (*United States* v. *Rogers*, 751 F.2d 1074, 1076-1077 (9th Cir. 1985)) and involves "an 'extreme sanction which should be infrequently utilized.' " *United States* v.

Pabian, 704 F.2d 1533, 1536 (11th Cir. 1983) (citation omitted). In view of the limited and preliminary function performed by the grand jury, courts of appeals have reversed district courts' pretrial dismissals of indictments based on prejudicial gestures or remarks by the prosecutor,[31] an expression of the prosecutor's personal opinion that an indictment was warranted,[32] a misstatement of the law on the vote needed to return an indictment,[33] and a prosecutorial conflict of interest.[34] These decisions serve to illustrate that an indictment should not be subject to pretrial dismissal because of a procedural violation at the grand jury stage.

Finally, dismissal of the indictment is not necessary in order to enforce the procedural rules applicable to grand juries. Allowing a defendant to obtain dismissal does nothing to help detect violations of Rule 6(d) in the first instance (see Pet. App. 10a (Wilkinson, J., dissenting)); rather, as this case typifies, a defendant will normally not be given access to grand jury materials under Fed. R. Crim. P. 6(e)(3)(C)(ii) on the basis of a conclusory and unsupported assertion of impropriety, and therefore he is usually in a position to argue for dismissal only after a violation has otherwise been uncovered. In this sense, the defendant is a "freerider," and relief to him cannot be justified on the theory that it provides a necessary incentive to ferret out breaches of the Rule. Moreover, as the district court pointed out, such violations as do occur can be revealed in a variety of ways entirely unrelated to dismissal on Rule 6(d) grounds, including the disclosure of grand jury transcripts under the Jencks Act, 18 U.S.C. 3500, and the "frequen[t occasions on] which the court is called upon to review grand jury material for various *in*

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[31] See *Pabian*, 704 F.2d at 1539-1540; *United States* v. *McKenzie*, 678 F.2d 629, 631 (5th Cir.), cert. denied, 459 U.S. 1038 (1982); *United States* v. *Cederquist*, 641 F.2d 1347, 1353 (9th Cir. 1981).

[32] See *McKenzie*, 678 F.2d at 632-633; *Cederquist*, 641 F.2d at 1353.

[33] See *McKenzie*, 678 F.2d at 633.

[34] See *In re Perlin*, 589 F.2d 260, 263-268 (7th Cir. 1978).

camera purposes" (Pet. App. 52a-53a).[35] Thus, there simply is not a sufficient problem of unrevealed and recurring grand jury irregularities to justify allowing defense dismissal motions as a needed means—like the Fourth Amendment exclusionary rule is thought to be—to detect and deter improprieties. Cf. *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 25 n.25.

Similarly, remedies other than dismissal of the indictment are available to ensure compliance with grand jury procedural requirements. For example, Fed. R. Crim. P. 6(e)(2) specifically provides that "[a] knowing violation of Rule 6 may be punished as a contempt of court."[36] See also 18 U.S.C. 401. Other sanctions might include directing the prosecutor to show cause why he should not be disciplined, requesting the Department of Justice to initiate a disciplinary proceeding against the prosecutor, or publicly chastising the prosecutor in the court's opinion. See *United States* v. *Hasting*, 461 U.S. 499, 506 n.5 (1983). The district court below also devised a remedy—requiring the government in future cases to certify to the court that Rule 6(d) is being observed (see page 8, *supra*)—that would be permissible in appropriate circumstances and would appear to be at least as effective as dismissal in bringing about prospective compliance with the Rule.[37] Because these alternatives focus on

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[35] Additional means would include the prosecutor's production of exculpatory information in grand jury materials pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), statements from grand jury witnesses about the proceedings that took place in their presence, complaints by grand jurors to the supervising judge about perceived improprieties, and a prosecutor's possible ethical obligations to advise the court or appropriate officials of the Department of Justice concerning violations of legal requirements of which he becomes aware.

[36] Indeed, the fact that Rule 6(e)(2) provides contempt as the only express sanction for breach of the Rule may suggest that the remedy of dismissal was not contemplated. See, *e.g.*, *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974).

[37] Because the infraction here appears to have been due to nothing more than a failure to appreciate the requirements of the Rule, there is no reason to suppose that anything beyond advice of the correct practice is necessary to prevent repetition of Rule 6(d) violations by the United States Attorney.

the person responsible for the procedural violation and do not impose unjustified costs on the criminal justice system, they are clearly preferable to the remedy of dismissal and better comport with "the general rule" that, even in cases of constitutional error, the "remedies should be tailored to the injury suffered * * * and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981); see also *Rushen* v. *Spain*, 464 U.S. 114, 118-120 (1983); *United States* v. *Blue*, 384 U.S. 251, 255 n.3 (1966); *United States* v. *Jones*, 766 F.2d 994, 1000-1001 (6th Cir. 1985), petition for cert. pending, No. 85-398. Where, as here, the procedural defect is not of constitutional magnitude and the issue of relief implicates society's compelling interest in the prompt and efficient enforcement of the criminal law, it is especially important that judicial remedies be carefully drawn to balance the competing considerations on both sides.

Nor may the supervisory power of the judiciary be properly invoked to justify dismissal where that remedy would not be warranted under Rule 6(d) itself. First, the district court specifically found (see pages 6-7 note 11, *supra*) that the government did not act in bad faith in this case or seek to deceive the grand jury by use of the joint testimony. Compare *Morrison*, 449 U.S. at 366 n.2. Likewise, there has been no showing of "a pattern of recurring violations * * * that might warrant the imposition of a more extreme remedy in order to deter further lawlessness" (*ibid.*), and indeed the defendants acknowledge (Br. 9) that violations of Rule 6(d) are "rare." But most importantly, this Court has rejected the proposition that courts can employ their supervisory power to circumvent controlling legal principles and provide remedies that would otherwise be improper. As explained in *United States* v. *Payner*, 447 U.S. 727, 736, 737 (1980):

> The values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power instead of [directly under the provision that has been violated].
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> * * * * *

> Were we to accept this use of the supervisory power, we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.

Thus, to the extent that, as we have argued, the relative costs and benefits do not justify dismissal of the indictment under Rule 6(d), the same result would apply under a court's supervisory power. There is no more reason for the exercise of supervisory power in this case than in the Court's other grand jury cases in which defendants have unsuccessfully sought to invoke such authority. See *Hobby* v. *United States*, No. 82-2140 (July 2, 1984), slip op. 10; *Costello*, 350 U.S. at 363-364.

B. The Policies Of Rule 6(d) Do Not Justify Dismissal Of An Indictment

The above general principles control the issue in the case. As we now discuss with specific reference to Rule 6(d), nothing in the nature of that Rule justifies carving out an exception to the *Costello* principle barring attacks on indictments for alleged procedural irregularities; on the contrary, there is if anything considerably less reason to permit such challenges where nothing more serious than a Rule 6(d) infraction is alleged.

The Advisory Committee notes to Rule 6(d) do not explain the rationale for the "one witness" provision. However, three possible purposes have been suggested.[38] First, because a witness is not subject to a requirement of secrecy concerning grand jury proceedings,[39] the presence of two witnesses would allow each to disclose the testimony of the other and thus impair the secrecy of the grand jury. Second, like the sequestration of witnesses at trial, the Rule may help to prevent the testimony of a witness from being influenced either

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[38] See, *e.g.*, Pet. App. 38a, 40a, 43a; *United States* v. *Kazonis*, 391 F. Supp. 804, 805 (D. Mass. 1975), aff'd, 530 F.2d 962 (1st Cir.) (Table), cert. denied, 429 U.S. 826 (1976); *United States* v. *Bowdach*, 324 F. Supp. 123, 124 (S.D. Fla. 1971).

[39] See Fed. R. Crim. P. 6(e)(2) and 1946 Advisory Committee note; *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983).

by his knowledge of other witnesses' testimony or by the presence of other witnesses while he is testifying. Third, the required exclusion may guard against intimidation of the grand jurors by the presence of numerous prosecution witnesses. None of these policies supports the proposition that a defendant is entitled to dismissal of the indictment for a violation of Rule 6(d).

As the Court has noted, the rule of grand jury secrecy serves several different purposes:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

United States v. *Procter & Gamble Co.*, 356 U.S. 677, 681-682 n.6 (1958) (citation omitted); see also, *e.g.*, *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 566-567 & n.11 (1983); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 219 & n.10 (1979). However, these objectives relate either to the effective operation of the grand jury and the criminal justice system or to the protection of innocent suspects who are investigated but not charged by the grand jury; an indicted defendant has no personal stake in the furtherance of these policies that would justify dismissal of the indictment against him. Thus, the defendant does not have "standing" to assert the systemic concerns that a breach of secrecy might allow those not yet indicted to escape, impede the willingness of the government's witnesses to testify freely before the grand jury, enable those being investigated to intimidate the grand jurors or suborn perjury by witnesses, or disclose the identity

of innocent people who were under investigation but ultimately not named in an indictment. While a violation of grand jury secrecy is surely a serious matter, it is not a ground that a defendant should be allowed to invoke for dismissal of the indictment. See *United States* v. *Navarro-Ordas*, 770 F.2d 959, 968 (11th Cir. 1985).[40]

Likewise, the possibility that the testimony of the witnesses might be affected by their joint appearance does not justify invalidation of the indictment. In essence, this objection is a challenge to the character of the evidence presented to the grand jury. See *United States* v. *Murphy*, 768 F.2d 1518, 1533-1534 (7th Cir. 1985). Under *Costello* and its progeny, however, a defendant is not entitled to contest the quality or adequacy of the evidence heard by the grand jury (see pages 18-19, *supra*). Indeed, since the government is free to use hearsay evidence and thus could dispense with the live testimony of one of the witnesses altogether, it is impossible to understand how the appearance of that witness jointly with another could materially impair the grand jury process or entitle the defendant to a dismissal of the charges.

The district court believed (Pet. App. 41a) that the joint testimony of Agents Rinehart and James gained "added persuasiveness" because the witnesses were able "instantly to supplement each other's testimony," and that their simultaneous appearance "tended to be detrimental to the grand jurors' ability to assess the credibility and personal knowledge of [each of them]." It seems to us at least as plausible to suppose that joint witness appearances would actually facilitate the grand jury's ability to assess their testimony. But even accepting that adverse effects on grand jury fact-finding are possible, that would not provide a legal basis for a defendant to obtain dismissal. The court's observations could be even more plausibly applied to a prosecutor's decision to present only hearsay evidence to the grand jury; the grand

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[40] Moreover, as we discuss below (see page 50, *infra*), and as the district court found (Pet. App. 40a), "the secrecy of the grand jury proceedings was not threatened by virtue of the joint appearance in this case." Our point here is that even if the secrecy of a grand jury were threatened, that would provide no basis for dismissing the indictment against a defendant.

jurors' ability to assess the credibility and personal knowledge of the declarants is thereby substantially impeded. And something similar might be said of a prosecutor's use of incompetent, unconstitutionally obtained, or "tainted" evidence; in each such instance the grand jurors' ability to assess the strength of the government's case is reduced or distorted by the government's reliance on evidence that will be inadmissible at trial. Nonetheless, in all of these cases, an indictment by a legally constituted and unbiased grand jury is not subject to challenge on such a ground. The simultaneous presence of two witnesses before the grand jury is if anything far less weighty a reason to dismiss an indictment than were the evidentiary flaws at issue in *Costello*, *Holt*, *Lawn*, or *Blue*.[41]

The final policy behind Rule 6(d) is that the grand jurors not be intimidated by the simultaneous presence of numerous prosecution witnesses. We do not quarrel with the proposition that a defendant is entitled to a grand jury that is free from coercion and intimidation in its consideration of the issue of probable cause. Thus, one can perhaps imagine cases in which the presence of nontestifying government personnel or other individuals would so far impair the decorum of the proceeding and undermine the grand jury's proper functioning that the defendant's right to an independent and unbiased grand jury would be violated[42] and a basis could exist for pretrial dismissal of the indictment. Such an occurrence, however, is far removed from the Rule 6(d) violation in this case or in virtually any case that can realistically be imagined. While Rule 6(d) embodies a policy choice that it is better for witnesses to testify individually, that by no means indicates that a failure to observe the Rule thwarts the grand jury process. And the concern that a defendant not be indicted by

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[41] We shall show below (see pages 51-53, *infra*) that the joint testimony of Agents Rinehart and James did not in fact result in prejudice to the defendants in the circumstances of this case. Our more general submission at this juncture is that any effect of a Rule 6(d) violation on the witnesses' testimony is legally insufficient to require that an indictment be dismissed.

[42] See, *e.g.*, *Hobby* v. *United States*, No. 82-2140 (July 2, 1984), slip op. 4, 7; *United States* v. *Dionisio*, 410 U.S. 1, 16 (1973).

a cowed grand jury, which the prophylactic requirement of Rule 6(d) may to some extent help to prevent, hardly suggests that every violation of the Rule, without more, taints the indictment. The remedy formulated for violations of Rule 6(d) should not be disproportionate to the practical interests impinged by the underlying breach. Indeed, the prospect of the requisite egregious circumstances is sufficiently remote and unimaginable that it may safely be concluded as a matter of law that, at least in the absence of substantial aggravating factors, a violation of the "one witness" rule does not infringe any interest of a defendant that would justify dismissal of the indictment.

II. ONCE THE DEFENDANT HAS BEEN FOUND GUILTY BY THE PETIT JURY AT TRIAL, DEFECTS IN THE INDICTMENT PROCESS PROVIDE NO BASIS FOR REVERSING THE CONVICTION

In this case, defendants Mechanik and Lill were found guilty beyond a reasonable doubt by a petit jury at a fair trial that was untainted by the violation of Rule 6(d) in the grand jury proceeding. The court of appeals nevertheless dismissed the conspiracy count in the indictment and reversed the convictions on that charge because of the joint testimony at the grand jury stage. Even if, contrary to our preceding submission, a Rule 6(d) violation could afford a ground to dismiss an indictment prior to trial, there are powerful additional reasons why such a procedural irregularity could not justify dismissal of the indictment and reversal of a conviction after the defendant's guilt has been established at trial.

On the one hand, the societal costs of such post-conviction relief are even greater than those that would be imposed by a pretrial remedy. Most obviously, there is the cost of repeating an otherwise valid trial on the merits of the defendant's guilt or innocence. A criminal trial involves a substantial expenditure of resources. See *Engle* v. *Isaac*, 456 U.S. 107, 127 (1982); *Davis* v. *United States*, 411 U.S. 233, 241 (1973); cf. *Anderson* v. *Bessemer City*, No. 83-1623 (Mar. 19, 1985), slip op. 9; *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 553, 555 (1984). It requires a commitment of the time and energy of the court and its staff, the prosecutor

and government investigatory personnel, and citizens called to participate as jurors or witnesses. In addition, for the victims of crime, the trial process can often be an "ordeal" that forces them to relive a painful and traumatic experience—a concern that, "in the administration of criminal justice, courts may not ignore." *Morris* v. *Slappy*, 461 U.S. 1, 14 (1983); see also *United States* v. *Hasting*, 461 U.S. 499, 507, 509 (1983). "The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources" (*Morris* v. *Slappy*, 461 U.S. at 15). The price to the criminal justice system of retrying a defendant already reliably determined to be guilty cannot be accepted lightly.[43]

Moreover, these are not the only costs that result when a conviction is set aside and a new trial ordered. First, as a practical matter, a retrial will not always be feasible. "Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Engle* v. *Isaac*, 456 U.S. at 127-128; see also *Hasting*, 461 U.S. at 507; *Davis*, 411 U.S. at 241. Thus, while such relief "may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution" (*Engle* v. *Isaac*, 456 U.S. at 128) and thereby "cost society the right to punish admitted offenders" (*id.* at 127). Furthermore, assuming that the retrial can proceed at all, similar problems—the passage of time, the dimming of memories, and the loss of some witnesses or evidence—may prevent the government from satisfying at the second proceeding, as it did at the first, the high standard of proof necessary to obtain a conviction. Finally, even if the defendant is again convicted, the intervening delay would be contrary to society's "interest in the prompt administration of

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[43] These considerations are well illustrated by the instant case, in which the defendants were convicted "after a three-month trial conducted at enormous expense to the United States and the defendants" (Pet. App. 51a).

justice" (*Hasting*, 461 U.S. at 509) and the dual law enforcement objectives of deterrence and rehabilitation (see *Engle* v. *Isaac*, 456 U.S. at 127 & n.32).

Accordingly, our legal system attaches "profound importance * * * [to] finality in criminal proceedings" (*Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 23), and it should not be made to bear the costs of a reversal of a conviction absent the most compelling reasons. Of course, there can be no question that, notwithstanding the costs, a new trial is necessary where an error has prejudiced the defendant's substantial rights and deprived him of a fair determination of guilt or innocence. See *Morris* v. *Slappy*, 461 U.S. at 14. The balance of interests decidely tips the other way, however, when the issue is post-trial reversal for a procedural error before the grand jury. In that circumstance, "the magnitude of the benefit conferred on * * * guilty defendants offends basic concepts of the criminal justice system." *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 9. As the district court below correctly understood, such post-trial relief would "confer[ ] * * * a windfall benefit on * * * [convicted] defendants" (Pet. App. 51a).

Once the defendant has stood trial and been convicted by the petit jury, he has no legitimate stake in obtaining review of the procedural regularity of the grand jury process. As explained above (see pages 16-19, *supra*), the aspect of the grand jury designed to benefit criminal suspects involves screening out unfounded charges that are not supported by probable cause and do not justify putting an individual to the burden and expense of trial. After a petit jury has rendered its verdict, the screening function of the grand jury is, both logically and practically, no longer relevant. If an impropriety in the grand jury has actually impaired the screening function and resulted in an unjustified indictment, the trial will result in an acquittal; for such a defendant, wronged though he may be, the remedy of reversal of a conviction is useless. On the other hand, with respect to the defendant who is convicted, the verdict establishes his guilt beyond a reasonable doubt and thus, *a fortiori*, the existence of probable cause to prosecute. See *United States* v. *Romano*, 706 F.2d 370, 374 (2d Cir. 1983); *Talamante* v. *Romero*, 620 F.2d 784, 791

(10th Cir.), cert. denied, 449 U.S. 877 (1980). The issue of probable cause merges into the judgment of conviction, and there is no room for concern that the defendant was subjected to trial on an insubstantial accusation. At that juncture, therefore, it is pointless to revisit the grand jury proceeding and undertake a hypothetical inquiry, as the court of appeals did here, into whether the procedural irregularity "could have" (Pet. App. 20a) influenced the grand jury's determination of probable cause. See *United States* v. *Murphy*, 768 F.2d at 1534. As Justice Stewart has explained:

> A grand jury proceeding * * * is not a proceeding in which the guilt or innocence of a defendant is determined, but merely one to decide whether there is a prima facie case against him. Any possible prejudice to the defendant * * * [in the grand jury proceeding] thus disappears when a constitutionally valid trial jury later finds him guilty beyond a reasonable doubt. In short, a convicted defendant who alleges * * * [an error in the grand jury proceeding] is complaining of an antecedent * * * violation that could have had no conceivable impact on the fairness of the trial that resulted in his conviction.

Rose v. *Mitchell*, 443 U.S. 545, 575-576 (1979) (Stewart, J., concurring in the judgment) (footnote omitted).[44]

The Court's decision in *Rose* v. *Mitchell*, *supra*, does not foreclose this analysis. The Court there considered whether a conviction free of trial error should be set aside because per-

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[44] In this sense, to engage in a post-conviction examination of the procedural regularity of the grand jury would be much like conducting a post-trial proceeding in a civil case to determine whether the losing party should have been granted summary judgment. See *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711, 713-715 (1983); cf. *Carey* v. *Piphus*, 435 U.S. 247, 260 (1978).

We reiterate that this case does not present the constitutional question of remedy where no grand jury indictment has been returned against a defendant or where the grand jury proceeding was so fundamentally defective as to be tantamount to the absence of an indictment. See page 14 and page 30 & note 42, *supra*. Accordingly, the Court need not consider the issue of post-trial relief in such situations.

sons of the defendant's race had been systematically excluded from service as grand jury foremen. The Court rejected, in that context, an argument similar to that we make in the instant case. However, in doing so, the Court did not reject the general proposition, put forward by Justice Stewart in concurrence and earlier by Justice Jackson in dissent in *Cassell* v. *Texas*, 339 U.S. 282, 298-305 (1950), that a defendant who has been convicted by a properly constituted petit jury can have "suffered no possible prejudice" from an error in the grand jury proceeding (443 U.S. at 552).[45]

The basis for the Court's holding in *Rose* was not that the defendant was actually injured by the discriminatory selection of the grand jury foreman, but that "discrimination on the basis of race in the selection of members of a grand jury * * * strikes at the fundamental values of our judicial system and our society as a whole" (443 U.S. at 556). The Court emphasized that "[d]iscrimination on account of race was the primary evil at which * * * the Fourteenth Amendment * * * [was] aimed" (id. at 554) and that such discrimination "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process" (*id.* at 555-556). In addition, the Court noted that its precedents had consistently reversed convictions because of racial discrimination at the grand jury stage "without inquiry into whether the defendant was prejudiced in fact by the discrimination" (*id.* at 556). Accordingly, without "deny[ing] that there are costs associated with this approach" (*id.* at 557), the Court con-

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[45] The Court summarized Justice Jackson's argument as follows (443 U.S. at 552 (citations omitted)):

> Unlike the petit jury, the grand jury sat only to determine probable cause to hold the defendant for trial. It did not consider the ultimate issue of guilt or innocence. Once a trial court heard all the evidence and determined it was sufficient to submit the case to the trier of fact, and once that trier determined that the defendant was guilty beyond a reasonable doubt, Mr. Justice Jackson believed that it "hardly lies in the mouth of a defendant . . . to say that his indictment is attributable to prejudice." "Under such circumstances," he concluded, "it is frivolous to contend that any grand jury, however constituted, could have done its duty in any way other than to indict."

cluded that "such costs * * * are outweighed by the strong policy * * * of combating racial discrimination in the administration of justice" (*id.* at 558).[46]

This reasoning has no application in the present case. A procedural irregularity before the grand jury such as a violation of Rule 6(d) cannot in any sense be deemed the equal of unconstitutional racial discrimination that "strike[s] at the fundamental values of our judicial system and our society as a whole." Without minimizing the obligation to observe the grand jury procedures prescribed as a supervisory matter in the Federal Rules, there is no "strong policy" of enforcing Rule 6(d) that would justify reversals of valid convictions where the essential role of the grand jury has not been impaired. Moreover, this case, unlike *Rose* v. *Mitchell*, involves no question of the representativeness of the grand jurors or the existence of a legally constituted and unbiased grand jury. See 443 U.S. at 551, citing *Hill* v. *Texas*, 316 U.S. 400, 406 (1942); see also *Costello*, 350 U.S. at 363 & n.7, citing *Pierre* v. *Louisiana*, 306 U.S. 354 (1939); *Hobby* v. *United States*, No. 82-2140 (July 2, 1984), slip op. 6; *Peters* v. *Kiff*, 407 U.S. 493, 497 (1972) (plurality opinion); *Castaneda* v. *Partida*, 430 U.S. 482, 509-510 (1977) (Powell, J., dissenting). Finally, in contrast to the issue of racial discrimination, there is no "unbroken line of cases" over "nearly a century" (443 U.S. at 551) holding that a defendant is entitled to have his conviction set aside on the ground of a procedural defect in the grand jury. Compare *Rose* v. *Mitchell*, 443 U.S. at 593-594 (Stevens, J., dissenting in part); *Cassell* v. *Texas*, 339 U.S. at 290 (Frankfurter, J., concurring in the judgment); *id.* at 296 (Clark, J., concurring).

The Court has recently observed that, even in cases of constitutional error, "the general rule [is] that remedies should be tailored to the injury suffered from the * * * violation and should not unnecessarily infringe on competing interests."

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[46] Significantly, in *Hobby* v. *United States*, No. 82-2140 (July 2, 1984), the Court refused to reverse the conviction of a white male who challenged the alleged exclusion of women and blacks from the position of federal grand jury foreman. The Court noted (slip op. 10) that "[l]ess draconian measures will suffice to rectify the problem."

United States v. *Morrison*, 449 U.S. 361, 364 (1981).[47] In the grand jury area, *Rose* v. *Mitchell* is a singular exception to this general rule in the unique context of racial discrimination. Where, as here, the special considerations underlying *Mitchell* are not present, the decision is inapplicable. See *United States ex rel. Bacon* v. *DeRobertis*, 728 F.2d 874, 875 & n.1 (7th Cir. 1984), cert. denied, No. 83-6765 (Oct. 1, 1984).[48]

Consistently with this analysis, the courts of appeals generally have refused to reverse otherwise valid convictions because of a procedural defect at the grand jury stage. "[T]he

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[47] Because a procedural defect in the grand jury proceeding is rendered immaterial by the defendant's conviction at trial, such a claim of procedural error is simply without legal consequence in the criminal case and provides no basis for any relief to the defendant in that action. But even apart from the curative effect of the conviction, a defendant still should not be entitled to challenge his conviction on this ground. Rather, the most specific and tailored remedy for the grand jury violation would be to require that the government correct the error by re-presenting its case to a grand jury in compliance with Rule 6(d), but not to reverse a fair and untainted conviction if a procedurally regular indictment is obtained. Hence, once a fresh indictment is returned, the defendant's conviction would remain in effect. Cf. *Waller* v. *Georgia*, No. 83-321 (May 21, 1984), slip op. 9-11; *Coleman* v. *Alabama*, 399 U.S. 1, 10-11 (1970); *Brady* v. *Maryland*, 373 U.S. 83, 88-91 (1963). Of course, such a remedy would be of little practical benefit to the defendant. However, this Court has squarely rejected the notion that merely "because other remedies would not be fruitful" the courts must impose a disproportionately severe and needlessly punitive remedy. *Morrison*, 449 U.S. at 365-366 n.2.

[48] In *Vasquez* v. *Hillery*, cert. granted, No. 84-836 (Mar. 4, 1985), the Court is asked to reconsider its decision in *Rose* v. *Mitchell*. With respect to the issue in *Hillery*, it is the view of the United States that a valid conviction by a petit jury should not be reversed because of racial discrimination in grand jury selection. While the elimination of any remaining vestiges of discrimination in the criminal justice system is a goal of the highest order, the ruling in *Mitchell* fails to give sufficient weight to both the substantial societal interests that counsel against the reversal of valid convictions for errors at the grand jury stage and the availability of remedies other than dismissal for correcting the problem of discrimination where it continues to

courts generally have been most cautious in invalidating indictments for alleged grand jury misconduct of the prosecutor." *Beatrice Foods Co.* v. *United States*, 312 F.2d 29, 39 (8th Cir.) (Blackmun, J.), cert. denied, 373 U.S.904 (1963). These decisions recognize that the remedy sought—dismissal of an indictment—"is an extraordinary one. To dismiss an indictment because of misconduct means that even though a jury unanimously found the defendant guilty beyond a reasonable doubt * * * we should nevertheless void his conviction because the prosecution had made a misstep in obtaining a grand jury determination of probable cause." *United States* v. *Thibadeau*, 671 F.2d 75, 77-78 (2d Cir. 1982). See also *United States* v. *Bari*, 750 F.2d 1169, 1176 (2d Cir. 1984), cert. denied, No. 84-6261 (June 17, 1985). Such post-trial relief is inappropriate since the taint in the grand jury has been "purged by the deliberations of an untainted petit jury." *United States* v. *Brien*, 617 F.2d 299, 313 (1st Cir.), cert. denied, 446 U.S. 919 (1980).

Thus, for example, a conviction cannot be set aside on the ground that perjured testimony was included in the evidence submitted to the grand jury.[49] Likewise, a conviction is not to

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exist. These considerations have particular force in a case such as *Hillery*, where the defendant seeks on collateral attack to void a conviction more than two decades old on the basis of a challenge to grand jury practices that have been abandoned by the state and are no longer in effect. Accordingly, notwithstanding the government's contrary submission in *Mitchell*, we believe upon further consideration that the analysis followed in *Mitchell* is incorrect and that the decision should be overruled. Of course, if *Mitchell* is overturned, that would strongly support the analysis that we have presented here; on the other hand, if the special rule of *Mitchell* for racial discrimination claims is reaffirmed, that would not, for the reasons stated in the text, control the question in this case.

[49] See, *e.g.*, *United States* v. *Johnson*, 767 F.2d 1259, 1275 (8th Cir. 1985); *United States* v. *Claiborne*, 765 F.2d 784, 791-792 (9th Cir. 1985); *United States* v. *Adamo*, 742 F.2d 927, 935-936, 939-942 (6th Cir. 1984), cert. denied, No. 84-5637 (Jan. 21, 1985); *United States* v. *Udziela*, 671 F.2d 995, 1000-1001 (7th Cir. 1981), cert. denied, 457 U.S.1135 (1982); *Coppedge* v. *United States*, 311 F.2d 128, 131-132 (D.C. Cir. 1962) (Burger, J.), cert. denied, 373 U.S. 946 (1963); but see *United States* v. *Basurto*, 497 F.2d 781 (9th Cir. 1974).

be overturned on the basis of a legal error in the prosecutor's instructions to the grand jury.[50] Nor is a conviction subject to reversal because of prejudicial publicity at the time of the grand jury proceeding.[51] These decisions—which involved defects that in fact posed a greater risk to the independence and integrity of the grand jury than the Rule 6(d) violation in this case—lend strong support to the conclusion that a procedural irregularity in the grand jury proceeding is not a basis for reversing a valid conviction determined by the petit jury at trial.[52]

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[50] See *United States* v. *Wright*, 667 F.2d 793, 796 (9th Cir. 1982); *United States* v. *Battista*, 646 F.2d 237, 242 (6th Cir.), cert. denied, 454 U.S. 1046 (1981); *United States* v. *Linetsky*, 533 F.2d 192, 200 (5th Cir. 1976).

[51] See *United States* v. *Reed*, 726 F.2d 570, 578 (9th Cir. 1984), cert. denied, No. 83-1912 (Oct. 1, 1984); *United States* v. *Civella*, 648 F.2d 1167, 1173-1174 (8th Cir.), cert. denied, 454 U.S. 867 (1981); *United States* v. *Brien*, 617 F.2d 299, 313 (1st Cir.), cert. denied, 446 U.S. 919 (1980); *Silverthorne* v. *United States*, 400 F.2d 627, 634 (9th Cir. 1968).

[52] Mechanik and Lill contend (Br. 2, 4) that if a higher standard governs post-trial motions to dismiss than pretrial motions, it should not be applied here because their motion to resolve the Rule 6(d) issue prior to trial was improperly opposed by the government on the ground that no unauthorized person had been present in the grand jury (see page 5, *supra*). The district court specifically found, however, that the simultaneous testimony in this case was not presented in bad faith (see pages 6-7 note 11, *supra*), and the government's opposition to the defendants' motion was based on the same good-faith view that the joint appearance of Agents Rinehart and James did not violate Rule 6(d). Moreover, this legal position was initially sustained by the district court even after the fact of the joint appearance had become known (see pages 5-6, *supra*). In these circumstances, it cannot be suggested that the government wrongfully deprived the defendants of the opportunity for a resolution of the Rule 6(d) issue before trial. But even if they were wrongfully deprived of the opportunity to mount an effective pretrial challenge to their indictment, that would not alter the fact that the petit jury's verdict conclusively demonstrates that the Rule 6(d) violation produced no error in the grand jury's screening function, and that review of the issue at this juncture is therefore pointless. If there was governmental wrongdoing, the proper recourse would be disciplinary action against the responsible prosecutors.

III. ABSENT PREJUDICE, A DEFENDANT IS NOT ENTITLED AT ANY STAGE TO DISMISSAL OF AN INDICTMENT OR REVERSAL OF A CONVICTION BECAUSE OF A PROCEDURAL VIOLATION IN THE GRAND JURY

A. There Is No Justification For Exempting Rule 6(d) Violations From The General Principle That Relief Is Not Given For Harmless Errors

We have shown above that a procedural irregularity in the grand jury should not entitle a defendant to either dismissal of an indictment prior to trial or reversal of a conviction after trial. But even assuming that such a grand jury error could in some cases be a sufficient ground for relief, dismissal or reversal would be entirely unwarranted in the absence of prejudice to the defendant from the error. In this case, however, the court of appeals expressly held (Pet. App. 18a-20a) that prejudice is not required in order to set aside an indictment and overturn a conviction, and on that basis it vacated the conspiracy convictions of Mechanik and Lill. That ruling is fundamentally incorrect.

The "general rule" is now well settled that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate." *United States* v. *Morrison*, 449 U.S. at 364, 365. Indeed, as *Morrison* makes clear, the rule extends to constitutional violations and is applicable "even though the violation may have been deliberate" (*ibid.* (footnote omitted)). Because "[t]he remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression" (*id.* at 366), "[a]bsent * * * [an] impact on the criminal proceeding * * * there is no basis for imposing a remedy in that proceeding" (*id.* at 365). This basic principle of judicial review "recognize[s] the necessity for preserving society's interest in the administration of criminal justice" and the requirement that "remedies should be tailored to the injury suffered from the * * * violation and should not unnecessarily infringe on competing interests. * * * * * Our approach has thus been to identify

and then neutralize the taint by tailoring relief appropriate in the circumstances * * *" (*id.* at 364, 365). See also *Rushen* v. *Spain*, 464 U.S. 114, 118-120 (1983).[53]

Equally well settled is the rule of harmless error. This "Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *United States* v. *Hasting*, 461 U.S. at 509.[54] As relevant here, Fed. R. Crim. P. 52(a) provides that "[a]*ny* error, defect, irregularity or variance which does not affect substantial rights *shall* be disregarded" (emphasis added). Likewise, 28 U.S.C. 2111 states that "[o]n the hearing of any appeal * * *, the court *shall* give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties" (emphasis added). Cf. Fed. R. Civ. P. 61.

The parallel principles reflected in *Morrison* and *Hasting* rest on the recognition that "when courts fashion rules whose violations mandate automatic reversals, they 'retrea[t] from their responsibility, becoming instead "impregnable citadels

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[53] Cf. *United States* v. *Bagley*, No. 84-48 (July 2, 1985), slip op. 10, *id.* at 10-11, 14 (opinion of Blackmun, J.), and *id.* at 1 (White, J., concurring in part and dissenting in part) (failure to disclose *Brady* material is reversible error only if there is a sufficient possibility that the material would have affected the outcome of the trial); *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984) (to prevail on a claim of ineffective assistance of counsel, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 872-873, 874 (1982) (showing of prejudice required where the government deported potential witnesses before they could testify for the defendant); *United States* v. *MacDonald*, 435 U.S. 850, 858-859 (1978) (proof of actual prejudice an important element of claim of post-indictment delay under the Speedy Trial Clause); *United States* v. *Lovasco*, 431 U.S. 783 (1977) (proof of actual prejudice required before a court will consider a due process claim arising from pre-indictment delay); *Weatherford* v. *Bursey*, 429 U.S. 545, 554-557 (1977) (defendant's right to counsel not infringed where attorney-client information obtained by government informant had no effect on trial).

[54] See also *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 11 n.10; *Luce* v. *United States*, No. 83-912 (Dec. 10, 1984), slip op. 4; *Rushen* v. *Spain*, 464 U.S. 114, 118 n.2, 120 (1983); *Hamling* v. *United States*, 418 U.S. 87, 134-135 (1974); *Breese* v. *United States*, 226 U.S. 1, 11 (1912).

of technicality.'" *Hasting*, 461 U.S. at 509 (quoting R. Traynor, *The Riddle of Harmless Error* 14 (1970), and Kavanaugh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925)). As the Court recently noted (*McDonough Power Equipment, Inc.* v. *Greenwood*, No. 82-958 (Jan. 18, 1984), slip op. 5):

> We have * * * come a long way from the time when all trial error was presumed prejudicial * * *. The harmless error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for "error" and ignore errors that do not affect the essential fairness of the trial.

Judicial observance of these doctrines serves two essential purposes. First, the doctrines act as a reminder in criminal cases that "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.). To reverse otherwise valid convictions for errors that did not prejudice the defendant could only "'generat[e] disrespect for the law and the administration of justice.'" *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 9 (quoting *Stone* v. *Powell*, 428 U.S. 465, 491 (1976)). Second, they conserve the scarce resources available to the system of justice by avoiding repeated proceedings that, in view of the harmlessness of the error, are not necessary to a fair and accurate determination of the controversy. See *McDonough Power Equipment, Inc.*, 464 U.S. at 553, 555; *Hasting*, 461 U.S. at 509.

In analyzing issues of procedural grand jury irregularity, the courts of appeals generally have recognized that there must be substantial prejudicial error before a defendant can be entitled to relief. Accordingly, even though courts have at times been more generous in entertaining attacks on indictments than we believe is appropriate, they have limited the remedy of dismissal, whether before or after trial, to "'flagrant cases'" in which "'the prosecutor's conduct

significantly infringed upon the ability of the grand jury to exercise its independent judgment.' " *United States* v. *Sears, Roebuck & Co.*, 719 F.2d 1386, 1391, 1392 (9th Cir. 1983) (citations omitted), cert. denied, No. 465 U.S. 1079 (1984).[55] "[E]ven in the case of the most 'egregious prosecutorial misconduct,' the indictment may be dismissed only 'upon a showing of actual prejudice to the accused' • • • [from] overbearing the will of the grand jury so that the indictment is, in effect, that of the prosecutor rather than the grand jury." *United States* v. *McKenzie*, 678 F.2d 629, 631 (5th Cir.) (citations omitted), cert. denied, 459 U.S. 1038 (1982). As the court explained in *United States* v. *Birdman*, 602 F.2d 547 (3d Cir. 1979), cert. denied, 444 U.S. 1032, 445 U.S. 906 (1980), " 'dismissal of an indictment • • • is an extreme sanction which should be infrequently utilized' " (602 F.2d at 559 (citation and footnote omitted)), and "more appropriate remedies exist than a windfall dismissal for unharmed parties" (*id.* at 561 (footnote omitted)); "to attempt to serve a public interest in the purity of the grand jury proceeding, by the per se sanction of dismissing indictments, is to disserve another public interest by frustrating prosecutions of criminals" (*id.* at 558-559).[56]

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[55] As the court of appeals elaborated in *Sears, Roebuck & Co.* (719 F.2d at 1392), "[t]he relevant inquiry • • • focuses not on the degree of culpability of the prosecutor, but on the impact of his misconduct on the grand jury's impartiality."

[56] See also *United States* v. *Jones*, 766 F.2d at 1000-1001; *United States* v. *Adamo*, 742 F.2d at 941; *United States* v. *Hyder*, 732 F.2d 841, 845 (11th Cir. 1984); *United States* v. *Reed*, 726 F.2d 570, 579 (9th Cir. 1984), cert. denied, No. 83-1912 (Oct. 1, 1984); *United States* v. *Pino*, 708 F.2d 523, 530 (10th Cir. 1983); *United States* v. *Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, 461 U.S. 932 (1983); *United States* v. *Cederquist*, 641 F.2d 1347, 1352-1353 (9th Cir. 1981); *In re Perlin*, 589 F.2d 260, 266 (7th Cir. 1978). In *McKenzie*, the court of appeals held that a showing of actual prejudice is required "whether the court is acting under its supervisory authority or its duty to protect the constitutional rights of defendants" (678 F.2d at 631). See also *United States* v. *Griffith*, 756 F.2d 1244, 1249 (6th Cir. 1985) (same), cert. denied, No. 84-6876 (Oct. 7, 1985); *United States* v. *Rogers*, 751 F.2d 1074, 1077 (9th Cir. 1985) (same); cf. *United States* v. *Fabian*, 704 F.2d 1533, 1540 (11th Cir. 1983) (holding that prejudice must

Similarly, until the decision in this case, all but one of the courts of appeals to consider the issue had held that, in the absence of prejudice, it is an inappropriate remedy for a violation of Rule 6(d) to reverse a conviction and dismiss the indictment. See *United States* v. *Condo*, 741 F.2d 238, 239 (9th Cir. 1984), cert. denied, No. 84-5793 (Jan. 14, 1985); *United States* v. *Kahan & Lessin Co.*, 695 F.2d 1122, 1124 (9th Cir. 1982); *United States* v. *Kazonis*, 391 F. Supp. 804, 805 (D. Mass. 1975), aff'd, 530 F.2d 962 (1st Cir.) (Table), cert. denied, 429 U.S. 826 (1976); *United States* v. *Rath*, 406 F.2d 757 (6th Cir.), cert. denied, 394 U.S. 920 (1969).[57] In each of these cases, the courts considered the nature and circumstances of the violation and determined whether the error was prejudicial or harmless.[58] On the other hand, the decisions of the Fifth Circuit, like the holding below, indicate that a Rule 6(d) violation per se invalidates the indictment without regard to a showing of prejudice. See *Latham* v. *United States*, 226 F. 420 (5th Cir. 1915) (alternative holding); *United States* v. *Echols*, 542 F.2d 948, 951 (5th Cir. 1976), cert. denied, 431 U.S. 904 (1977) (dictum); see also *United*

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be shown for dismissal on constitutional grounds, but leaving open whether prejudice is required for dismissal under supervisory powers); *United States* v. *Serubo*, 604 F.2d 807, 817-818 (3d Cir. 1979).

[57] In addition, an earlier panel of the Fourth Circuit, in *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181 (1982), cert. denied, 459 U.S. 1105 (1983), declined to require automatic dismissal of an indictment prior to trial for violations of Rule 6(d). Stating that "each situation should be addressed on a *sui generis* basis," the court found that the "invasions of the grand jury proceedings were rare, inadvertent and nonprejudicial to any defendant" (689 F.2d at 1184-1185 (footnote omitted)). The court concluded that "[i]t is simply inappropriate to nullify grand jury work * * * because of technical, trivial, harmless violations of no significant duration of Fed. R. Crim. P. 6(d)" (689 F.2d at 1186). While purporting to distinguish *Computer Sciences* (Pet. App. 19a-20a), the court below has in fact overruled it. See Pet. App. 12a (Wilkinson, J., dissenting).

[58] Because a violation of Rule 6(d) is not a constitutional error, the appropriate harmless-error standard is that of *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946), rather than the more stringent test of *Chapman* v. *California*, 386 U.S. 18, 23-24 (1967).

States v. *Fulmer*, 722 F.2d 1192, 1195 (5th Cir. 1983); *Martin* v. *United States*, 266 F.2d 97, 99 (5th Cir. 1959) (no violation found because grand jury was not in session).[59]

These per se rulings are unfounded. First, they are irreconcilable with the general principle recognized outside the Rule 6(d) context that indictments are not to be dismissed in the absence of prejudice (see pages 42-43, *supra*). There is no reason to apply a more exacting standard to violations of Rule 6(d) than to other instances of prosecutorial error; on the contrary, as previously illustrated (see pages 38-39, *supra*), the latter frequently entail a more substantial threat to the grand jury process. And since this Court has held that even constitutional violations do not warrant relief if they result in no prejudice at trial, it is "inexplicable," as Judge Wilkinson commented in dissent in this case (Pet. App. 9a), how Rule 6(d) can be given a preferred position that requires per se dismissal.

Indeed, this Court has already rejected the notion that it should "adopt a strict approach [to the Federal Rules of Criminal Procedure] and declare that any noncompliance * * * requires reversal." *Hamling* v. *United States*, 418 U.S. 87, 134 (1974) (construing Fed. R. Crim. P. 30). The Court's analysis in *Hamling* is also apt here (418 U.S. at 134-135):

> We think such an approach would be unduly mechanical, and would be inconsistent with interpretation *in pari materia* of * * * [specific individual rules] and other relevant provisions of the Federal Rules of Criminal Procedure, since Rule 52(a) specifically provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." This provision suggests the soundness of an approach * * * [that] examine[s] the prejudice to the defendant in deciding whether reversal is required * * *.

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[59] Mechanik and Lill cite (Br. 10-11 n.9, 13-14) a string of district court cases in which indictments were dismissed on Rule 6(d) grounds. However, a number of these decisions have been disapproved by courts of appeals in other circuits. See, *e.g.*, *United States* v. *McKenzie*, 678 F.2d at 631, disapproving *United States* v. *Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977); *United States* v. *Birdman*, 602 F.2d at 566, disapproving

Moreover, the justifications offered by the court of appeals below for dispensing with a showing of prejudice in the Rule 6(d) context do not withstand analysis. First, the court stated (Pet. App. 19a) that "Rule 6(d) is plain and unequivocal in limiting who may appear before a grand jury." That consideration, however, is simply irrelevant. The clarity and strictness of the Rule may bear on the existence of a substantive violation vel non and on the prosecutor's culpability (see *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 15 n.14), but they do not illuminate the remedial issue of whether the error has "affect[ed] substantial rights" of the defendant (Fed. R. Crim. P. 52(a)). The point that is relevant, and undisputed, is that Rule 6 itself provides no sanction for a violation of the "one witness" provision nor indicates in any way that the usual standard of prejudicial error is to be ignored; indeed, as noted above (see page 25 note 36, *supra*), the express inclusion in the Rule of the sanction of contempt may suggest dismissal—and certainly the extraordinary remedy of dismissal without regard to prejudice—is not authorized for a Rule 6(d) violation.

Second, the court of appeals stated (Pet. App. 19a) that "[r]equiring a defendant to show prejudice would impose a difficult burden that could undermine the protection that the rule provides." But "[w]hile the determination of likely prejudice stemming from an unauthorized presence obviously entails some difficulty, it is doubtful whether that determination is substantially more speculative than the determination of prejudice made by courts considering whether other types of irregularities require dismissal of indictments." 2 W. LaFave & J. Israel, *Criminal Procedure* § 15.6, at 333 (1984)

United States v. *Treadway*, 445 F. Supp. 959 (N.D. Tex. 1978). In addition, as the district court below correctly observed (Pet. App. 45a), these district court cases have simply "indiscriminately appl[ied] the *per se* rule" without independently considering its correctness. Moreover, in these cases "without exception * * * dismissal was ordered before trial" (*id.* at 52a (footnote omitted)), and thus they provide no support for reversal of a valid conviction determined by the petit jury at trial. Finally, we note that review was not sought in these cases because the government, in the exercise of its discretion, found it preferable and more expeditious in the particular circumstances to reindict rather than to appeal.

(footnote omitted).[60] Nor is there any more basis here for the court of appeals' concern than in other areas in which a similar argument has been rejected by this Court. See, *e.g.*, *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 871 (1982) (while defendant "may face a difficult task in making a showing of materiality, the task is not an impossible one"); *Weatherford* v. *Bursey*, 429 U.S. 545, 556-557 (1977) ("[n]or do we believe that * * * the difficulties of proof will be so great that we must always assume * * * that [the government's violation] has the potential for detriment to the defendant"). In fact, the court of appeals' assumption is refuted by the district court's opinion in this case, which demonstrates that the potential prejudice from a Rule 6(d) violation can be analyzed conscientiously and reliably. And, as discussed above (see pages 24-27, *supra*), per se dismissal is not necessary to ensure compliance with applicable grand jury procedures; other, more tailored remedies are available that, by focusing on the prosecutor who is responsible for the violation, do not interfere with the societal interest in the enforcement of the criminal law.[61] If the court of appeals' analysis were adopted, there would be little left in the grand jury area of the principle that only substantially prejudicial errors are cognizable on appeal.[62]

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[60] Because most Rule 6(d) violations are by their nature unlikely to have had any prejudicial impact on the grand jury's charging decision, the "difficulty" in showing prejudice seems to us little more, in general, than the difficulty of showing anything else that does not in fact exist.

[61] We note in particular that a court's supervisory power—which the court of appeals did not even purport to rely on here—does not justify a rule of per se dismissal in the absence of prejudice. See *United States* v. *Hasting*, 461 U.S. at 505-507; *United States* v. *Morrison*, 449 U.S. at 366 n.2; see also page 43 note 56, *supra*.

[62] As Judge Wilkinson pointed out in his dissent (Pet. App. 10a (footnote omitted)), the "truly difficult burden on the defendant" is not the proof of prejudice but the "detection of all Rule 6(d) violations" in the first place, and the "per se rule does nothing to lighten [that difficulty]." And the reverse is also true: such violations of Rule 6(d) as do occur can come to light in a number of ways apart from defense motions to dismiss (let alone motions to dismiss in the absence of prejudice). See pages 24-25, *supra*. Moreover, in other areas, the Court has consistently followed a standard of prejudice even where the underlying violation might be difficult to discover. See, *e.g.*,

The district court in this case also noted (Pet. App. 45a) the argument that the issue of actual prejudice "would require a detailed inquiry that inevitably frustrates and undermines the secrecy of grand jury testimony" and "would impose upon the court a difficult burden that would outweigh the benefits to be derived." We believe that these considerations lend support to our submission in Part I, *supra*, that procedural irregularity in the grand jury should not be a basis for dismissing an indictment because the substantial systemic costs of permitting the remedy of dismissal are not justified by the marginal or nonexistent benefits that would result for the criminal justice process. However, if this case is not disposed of on those grounds and the issue of prejudice is therefore to be addressed, the concerns noted by the district court do not call for a rule of per se dismissal without regard to the harmfulness of the Rule 6(d) error.

It is of course true that a burden is imposed by the general requirement that a court assess the prejudicial effect of a violation before granting relief to a criminal defendant; it would undoubtedly be more expeditious, once a violation has been found, to proceed to decision without undertaking a further inquiry into whether the violation was prejudicial or harmless. But the rules of prejudicial and harmless error recognize that other important considerations counsel against the dismissal of an indictment or the reversal of a conviction unless the substantial rights of the defendant to a fair and accurate process were infringed. In the Rule 6(d) context as elsewhere, an examination of prejudice is warranted both by the overriding inefficiency of duplicating a proceeding that was not adversely affected by the legal error and by the need to maintain a balanced criminal justice system that does not allow nonprejudicial defects to frustrate the substantial public interest in effective law enforcement.

United States v. *Bagley*, *supra*, and *United States* v. *Agurs*, 427 U.S. 97 (1976) (*Brady* violation); *Weatherford* v. *Bursey*, *supra* (access to attorney-client information by undercover government informant).

Moreover, we see no reason why the district court's concerns should prove to be more significant or problematic in Rule 6(d) cases than in other cases involving a wide range of grand jury issues in which courts have adhered to a standard of prejudicial error. Indeed, given the unlikelihood that a violation of Rule 6(d) would have impaired the grand jury's determination of probable cause (see pages 21-22, 29-31, *supra*), it would be highly incongruous to conclude that Rule 6(d) necessitates a special remedy of per se dismissal that is not applicable to other grand jury errors.[63]

B. The Defendants Were Assuredly Not Prejudiced By The Agents' Joint Testimony Before The Grand Jury

Under its analysis of per se dismissal, the court of appeals did not inquire whether defendants Mechanik and Lill had been prejudiced by the joint grand jury testimony of Agents

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[63] Because *Latham* v. *United States*, *supra*, is the only case (prior to this one) in which a conviction has been reversed for a Rule 6(d) violation (even there Rule 6(d) was an alternative ground for decision), and because subsequent opinions have heavily relied on *Latham*, we briefly note that that decision has been overtaken by more recent developments in the law. First, *Latham* was decided prior to the adoption of the Federal Rules of Criminal Procedure in 1946. Moreover, the per se approach was "first adopted * * * when transcripts were unavailable and unauthorized presence therefore was one of the few grand jury irregularities that could readily be raised by the defendant" (2 W. LaFave & J. Israel, *supra*, at 333 (footnote omitted)); thus, from the beginning, *Latham* was not sought to be harmonized with other features of grand jury law, and it essentially has been superseded by later developments. Most importantly, *Latham* was decided in a bygone day when courts were " 'impregnable citadels of technicality' " (*Hasting*, 461 U.S. at 509 (citation omitted)), and the opinion in *Latham* shows that the court considered the existence of a violation to be sufficient without more to require reversal. Indeed, the court specifically relied (226 F. at 424) on the then-extant statute that directed courts not to invalidate indictments or judgments "by reason of any defect or imperfection *in matter of form only*, which shall not tend to the prejudice of the defendant" (Rev. Stat. § 1025 (1873 ed.) (emphasis added)); construing this provision, the court held that the presence of an unauthorized person in the grand jury room was "a matter of substance" (266 F. at 424), not merely an "irregularity or informality" that could be treated as a matter of form (*ibid.*), and therefore that an absence of prejudice was irrelevant. This reasoning has no continued vitality, of course, under contemporary principles of prejudicial and harmless error.

Rinehart and James. However, applying the proper standard, it is manifest that no prejudice occurred. Indeed, the district court, upon painstaking analysis of the grand jury record, found that the possibility of actual prejudice was "utterly remote" (Pet. App. 51a). This finding is amply supported in the record, and neither the court of appeals nor the defendants have suggested that it was clearly erroneous.[64]

The violation of Rule 6(d) in this case implicates only tenuously, if at all, the policies underlying the Rule: preserving the secrecy of the grand jury proceedings and avoiding intimidation or undue influence upon witnesses or grand jurors by the presence of unauthorized persons. Here, the secrecy of the grand jury was not realistically threatened, since both agents had full access to all grand jury materials pursuant to Fed. R. Crim. P. 6(e)(3)(A)(ii). Thus, their joint testimony would not have revealed information to either of the agents that would not otherwise have been properly disclosable to them. Moreover, because grand jury material had been furnished to them under that Rule, the agents were obligated "not [to] disclose matters occurring before the grand jury." Fed. R. Crim. P. 6(e)(2). Accordingly, while witnesses are not normally subject to the rule of grand jury secrecy (see Pet. App. 40a; page 27, *supra*), Agents Rinehart and James were not free to make unauthorized disclosures of any grand jury information to which they were privy. See also *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983) ("[w]itnesses are not under the prohibition [of grand jury secrecy in Rule 6(e)(2)] unless they also happen to fit into one of the enumerated classes"). In these circumstances, as the district court found (Pet. App. 40a), "[r]ealistically * * * the secrecy of the grand jury proceedings was not threatened by virtue of the joint appearance in this case," and it has never been contended that grand jury secrecy in fact was breached by the agents.

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[64] This is not to say that the punctilious analysis of the district court in this case would be necessary to establish that no prejudicial error had occurred. As the following discussion indicates, the finding of harmlessness here went well beyond that which is required.

Similarly, the risk that the joint appearance might have influenced the testimony of the agents or intimidated the grand jurors was, to say the least, remote. Agents Rinehart and James "were in command of the entire investigation" (Pet. App. 41a), and it is inconceivable that their joint testimony involved any information that was not already known to both of them. Furthermore, because of the agents' access to all of the grand jury materials, each of them was aware that the transcript of his testimony could be seen by the other; to the extent there was any possibility that the presence of one agent could have affected the testimony of the second agent—and, once again, no assertion has been made that this was in fact the case—it would have been no more inhibiting than the knowledge that the transcript of the testimony would have been available to be reviewed.[65]

Nor is it plausible that the grand jurors could have been intimidated by the presence of the one additional agent. Agents Rinehart and James were not strangers to the grand jurors; prior to their joint appearance, each "had either been previously sworn as an agent of the grand jury or had previously testified individually before the grand jury" (Pet. App. 41a). Moreover, while it is possible in the abstract that to some limited degree "the joint witness approach tended to be detrimental to the grand jurors' ability to assess the credibility and personal knowledge of [each agent]" (*ibid.*), as the district court believed, it is not at all obvious why the grand jury would not in fact have been in a better position to evaluate credibility and personal knowledge by observing the interaction of the two witnesses giving testimony together.[66] But be that as it may, it is clear that this technical violation of Rule 6(d) was not such a substantial deficiency in the grand jury process that, under a standard of prejudicial error, it invalidates the indictment.

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[65] The only likely effect of the agents' joint presence would have been the prompt correction of any inadvertent misstatements that might have been made.

[66] In this respect, the issue of simultaneously testifying witnesses may be different from other problems involving the presence of unauthorized persons under Rule 6(d).

In our view, the foregoing discussion is sufficient to show that the court of appeals erred in reversing the conspiracy convictions of Mechanik and Lill. But there are further circumstances here that compellingly demonstrate that the Rule 6(d) violation could not have been prejudicial error.

First, the joint testimony in this case related only to a superseding indictment, which, insofar as relevant, made certain modifications in the conspiracy count in an earlier and indisputably valid indictment. It is simply untenable to conclude that these changes, even if attributable to the agents' joint testimony, were so significant that the entire charge—including the slightly less detailed conspiracy charge in the first indictment—should be invalidated. Cf. *United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985). It is quite plain that the conspiracy counts in both indictments involved one and the same offense. Indeed, even without the superseding charge, the government could have proceeded to trial on the first indictment and properly proved the unalleged overt acts that were added in the second indictment.[67] In these circumstances, the Rule 6(d) violation is scarcely a sufficient basis for throwing out the conspiracy count.

Beyond this, the district court found, on the basis of a meticulous examination of the record, that every "alteration[ ] and addition[ ] to the conspiracy count * * * [material to the conspiracy charge against Mechanik and Lill] was * * * supported by testimony apart from the Rinehart/James joint testimony" (Pet. App. 47a). Thus, "[i]nsofar * * * as the joint testimony of Agents Rinehart and James ultimately proved to be material, the grand jury also had before it ample independent evidence to support a probable cause finding of the charges" (*id.* at 51a). Based on this separate and untainted evidence, the district court was able to find that "the grand jury would * * * undoubtedly have returned the very same second indictment even had Agents Rinehart and James testified separately" (*ibid.*). There is no

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[67] See, *e.g.*, *United States* v. *Johnson*, 575 F.2d 1347, 1357 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979); *United States* v. *Elliott*, 571 F.2d 880, 911 (5th Cir.), cert. denied, 439 U.S. 953 (1978); *United States* v. *Harris*, 542 F.2d 1283, 1300 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977).

basis either in the Federal Rules or in common sense to invalidate an indictment that is fully supported by probable cause independent of the Rule 6(d) violation. Cf. *Nix* v. *Williams*, No. 82-1651 (June 11, 1984). A contrary result would be a profligate expansion of the legitimate procedural protections that our legal system affords to criminal defendants.[68]

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[68] Even if the court of appeals were correct in applying a standard of per se dismissal to reverse the conspiracy convictions, it would not follow, as Mechanik and Lill assert, that the court erred in affirming their substantive convictions. In all relevant respects, these substantive counts in the first and second indictments were identical. Accordingly, the issue as to those counts is not one of prejudice but rather of causation; the Rule 6(d) violation in connection with the superseding indictment did not cause or contribute to the substantive charges that in fact had already been included in the initial, untainted indictment. Suppose the grand jury had originally charged the defendants in two indictments, one containing the substantive counts and the other the conspiracy count, and had then returned a superseding conspiracy indictment following the joint testimony of the DEA agents. It would be frivolous to contend that the error in the joint testimony could in any way upset the unchanged and preexisting substantive indictment. The present situation is no different in substance and calls for no different result. See also *Peterson* v. *Air Line Pilots Association*, 759 F.2d 1161, 1166 n.13 (4th Cir. 1985), petition for cert. pending, No. 85-321 (in *Mechanik*, "a superseding indictment deemed defective was held, in effect, to have revivified portions of the original indictment not suffering the malaise infecting the superseding indictment").

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it reversed the conspiracy convictions and affirmed insofar as it affirmed the substantive convictions.

Respectfully submitted.

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